Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT of the UNITED STATES

BEN F. BARCUS,
Petitioner,

v.

MARK SCHNEIDER,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Ninth Circuit erred in concluding, contrary to principals of equity and the Court's inherent power to police misconduct within its proceedings, that 11 U.S.C. § 1330(a) divests the Bankruptcy Courts of policing powers to sanction an attorney/debtor who made false statements under oath and committed fraud because over six months had lapsed preceding the hearing for sanctions (which delay was caused by a attorney/debtor who undertook efforts to frustrate Petitioner's effort to expose such misconduct)?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The Petitioner here and Appellant below is Ben F. Barcus. The Appellee below and Respondent here is Mark A. Schneider.

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OPINIONS BELOW

The opinion in the Court of Appeals was not published. The Court of Appeals memorandum was issued of record in the proceedings on June 14, 2005 and is attached as Pet. App. A-20. It denied Petitioner's Motion for Reconsideration en banc on July 27, 2005. Pet. App. A-30. Its Judgment was issued on June 14, 2005.

JURISDICTION

The Court of Appeals entered its judgment on August 8, 2005. On July 27, 2005, the Court of Appeals entered its Order denying Petitioner's Motion for en banc Reconsideration of its mandate. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of Title 11 of the United States Code commonly referenced as the United States Bankruptcy Code.

The pertinent provisions are as follows:

> **11 U.S.C. Section 349(a):**
> Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

> **11 U.S.C. Section 523(a):**
> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by---

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . .

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny . . .

11 U.S.C. Section 1307(c):
On request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including---

(1) unreasonable delay by the debtor that is prejudicial to creditors . . .

(6) material default by the debtor with respect to a term of a confirmed plan . . .

(7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;

11 U.S.C. Section 1330(a):
On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005-11 U.S.C. Section 1328:

(a). . .the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except and debt—

(2) of the kind specified in section 507(a)(8)(c) or in paragraph (1)(B), (1)(C), (2), (3), (4),(5), (8) or (9) of section 523(a).

STATEMENT OF THE CASE

This is a case involving the lower court's jurisdiction and ability to police egregious misconduct that occurs within a court proceeding. Resolution of the question presented here will alleviate Congressional undermining of the Court's inherent policing powers and ability to do equity. Resolution of the question presented will deter misconduct of a party to a bankruptcy proceeding.

The Respondent, who is also an attorney and officer of the Court, facilitated a scheme of deceit that has been described by the District Court as being egregious and contrary to Washington Rule of Professional Conduct 8.4, which prohibits conduct involving dishonesty, fraud, deceit, misrepresentation or conduct prejudicial to the administration of justice. The District Court noted Respondent's conduct "raises serious questions about [Respondent's] fitness for the practice law within this jurisdiction." Regardless, the lower courts have read 11 U.S.C. § 1330(a) as limiting a court's power to police such misconduct (or to otherwise fashion a remedy equitable to all parties concerned) solely to events brought to the court's attention within 180 days of bankruptcy confirmation.

Review is urgently needed to rectify an apparent encroachment upon the separation of powers doctrine and to resolve a conflict with a Congressional limitation of the Bankruptcy Court's authority over bankrupt debtors.

Moreover, review is urgently needed to determine the standards of the court's ability to police misconduct on a case-by-case basis, rather than be restricted without discretion. Moreover, there have been substantial changes to the United States Bankruptcy Code subsequent to the parties having filed their respective Appellate briefs. The theories and the case law cited below by Respondent are in direct conflict with the present articulated Congressional mandate contained within the revised Bankruptcy Code.

The 2005 Congressional redraft of the Bankruptcy Code indicates a clear public policy mandate favoring the theories advanced by the Petitioner. For example, debts from fraud will no longer be dischargeable in Chapter 13. See, 11 U.S.C. § 1328 (2005), which substantially modified the former super-discharge under Chapter 13 to not allow for debts procured by fraud to be discharged. The modified Code specifically exempts debts procured by fraud, and debts procured by embezzlement or defalcation from discharge in Chapter 13. See, 11 U.S.C. § 1328(a)(2) (2005). Petitioner converted from Chapter 7 to Chapter 13 at the last moment, on the eve of trial, to determine that the debt owed Petitioner was not dischargeable under 11 U.S.C. § 523(a)(2) (fraud) and 11 U.S.C § 523(a)(4) (embezzlement and defalcation).

Certiorari is also necessary in order to develop a comparison to and development of the public policy trends to the issues presented to the Court below on appeal, *vis-à-vis*, the exceptional facts of this case. There is an old adage: where there is an injustice, the law should allow a remedy. The Respondent's willful contempt of the Bankruptcy Court rules and orders, and Respondent's misconduct during the pending Bankruptcy proceedings call for distinguishing the facts of this case from *In re Valenti*, 310 B.R. 138, 145 (BAP 9th Cir. 2004) and the time limitations of 11 U.S.C. § 1330(a).

Respondent's fraud and abuse of the judicial process has been ignored by the Court below by adoption of a bright line (absolutely no exception) rule limiting creditors in bankruptcy to the time in which fraud could be discovered and relief from the effects of such fraud could be obtained.

Certiorari is also necessary in order to develop a comparison to the public policy trends to the issues presented to this Court on appeal, *vis-à-vis*, the exceptional facts of this case.

A. Factual Background

Petitioner, Ben F. Barcus, is a creditor in Respondent's bankruptcy who objected to confirmation of the Respondent's Chapter 13 plan. The Chapter 13 filing came only after the Respondent's conversion from Chapter 7 and a then pending bankruptcy adversary proceeding determining debts owed Petitioner were not dischargeable based upon fraud and embezzlement. Pet. App. A-36.

Respondent was employed by Petitioner for a period of time from January 1992 up to February 23, 1998, when his misconduct was discovered. Petitioner is a lawyer; Respondent was an associate attorney employed by Petitioner. Pet. App. A-36.

Petitioner filed a Chapter 13 proof of claim. The Petitioner's claim was based upon, in the broadest sense, that the Respondent, his former employee, committed several acts of theft, as well as ancillary claims. Pet. App. A-36. Petitioner's claim has essentially three (3) separate components. First, Respondent carried out an elaborate "on the side business" during his employment with Petitioner wherein he diverted client cases to himself and personally accepted attorneys' fees paid by clients through his "on the side business" during his tenure as an employee with Petitioner.

Second, Respondent fraudulently induced a number of Petitioner's clients to remove their files from Petitioner's offices after Respondent's termination of employment, as well as converted attorneys' fees due and owing Petitioner during Respondent's course of employment, but collected by Respondent after his termination. Third, Respondent incurred unauthorized and fraudulent charges on Petitioner's business credit card account, including among other things, the purchase of a computer, clothing and meals for Respondent's "on the side" employees. Pet. App. A-36.

The Petitioner objected to confirmation of Respondent's Chapter 13 plan due to Respondent's lack of good faith in converting from Chapter 7 grounded upon three separate and distinct sets of circumstances. First, the Petitioner is the largest single creditor of Respondent. Second, Respondent has consistently displayed his lack of good faith by fostering and encouraging abuse of the legal process. In particular, Respondent has been an obstructionist in the discovery process resulting in two Orders of Contempt being issued against him in the adversary proceeding. Third, Respondent's conduct throughout the bankruptcy proceedings, including statements made under oath and in bankruptcy schedules, had not been truthful[1]. Pet. App. A-37.

Ultimately, Petitioner's objections to confirmation were reviewed at a Chapter 13 confirmation hearing on January 25, 2001. One issue before the Bankruptcy Court was whether a "loan" identified by Respondent from his father, Robert Schneider, actually existed. The loan was the sole basis of the father's claimed possessory lien of valuable goods. There was no promissory note evidencing the loan; nor was there any evidence of transfer of funds. Pet. App. A-41-42. Respondent had testified three times previously under oath that no such document existed. These were before the confirmation hearing (1) at the Chapter 7 meeting of creditors; (2) at his deposition; and, (3) at the Chapter 13 meeting of creditors. Pet. App. A-37

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[1] Respondent's pre-confirmation conduct is distinct from the conduct referenced during the November 26, 2002 Motion and Joinder to Dismiss. Evidence of Respondent's lack of candor is compelling because he is an attorney and officer of the Court. Evidence of Respondent's dishonesty pre-confirmation included his attempts to conceal his on-the-side practice by depositing client funds into a third party attorneys' bank account, use of a false legal practice business name in letterhead and legal correspondence to insurers and others, purchase of meals and a computer and converting the same to his own use, false and misleading testimony relating to his relationship with witnesses and other individuals, as well as Respondent's false deposition testimony that he did not provide legal services to others not known to Petitioner or his counsel.

However at the Chapter 13 confirmation hearing, Respondent produced a document purporting to be a letter drafted by his father, confirming the existence of a loan transaction.[2]

Also, at issue before the Bankruptcy Court at time of the hearing was the forgery of a Notary and signature by the Respondent of a Washington State Superior Court Satisfaction of Judgment, which document was used by Respondent to attempt to collect "on-the-side" fees, prior to his filing Bankruptcy relief. Despite these issues, Respondent's Chapter 13 bankruptcy plan was confirmed.

Subsequent to Chapter 13 confirmation, the Bankruptcy Court authorized a Fed. R. Bankr. Proc. 2004 examination of Respondent's father, Robert Schneider. A significant amount of effort was needed to obtain Robert Schneider's presence. Petitioner affected service upon Schneider Sr. for the out-of-state appearance and examination, which was scheduled to occur on March 23, 2001; despite service of process being affected, Schneider Sr. failed to appear. This forced Petitioner to enlist the service of the United States Marshall to assure Schneider, Sr.'s appearance. Being compelled to appear under threat of possible action by the U.S. Marshall's Services, Schneider Sr. finally appeared on April, 19, 2001 and an examination ensued. Pet. App. A-37.

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[2] This Court will note that the Respondent's unequivocal confirmation hearing testimony relating to authenticity of the note was:

Q. "The letter submitted by you as an exhibit in this case described as the Letter from Robert Schneider, did you type that letter?"

A: "No."

Q: "Who signed that letter."

A: "Robert Schneider, my dad?"

Q: "Did you sign that letter for your father?"

A: "No."

TR. page 73 line 15 -22. Pet. App. A-43.

Ultimately, Robert Schneider appeared after threat of having the United States Marshall Service bring him in custody to the examination. At that time, handwriting exemplars of Robert Schneider were obtained. However, Robert Schneider refused to answer any questions as to whether he in fact authored the letter in question purportedly under advice of counsel. Pet. App. A-37.

Respondent had instructed his father, Robert Schneider, not to answer any such questions, which is confirmed by Respondent's letter, which stated in pertinent part: "Once the signatures have been made, I understand my father may leave. Finally, as I have been told and passed on to my father no questioning of any kind will be attempted. My father has indicated he will leave if there is any attempt at questioning." All of these incidents of the Respondent's (an attorney) disdain for the judicial proceedings, discovery process, including this willful obstruction of the Bankruptcy Court's Order requiring Robert Schneider to appear for examination, occurred within 180 days of the confirmation hearing.

After obtaining the handwriting exemplars, Petitioner retained the services of a forensic specialist to analyze the signature on the letter compared to Robert Schneider's signature. The conclusion of the expert, Mr. Timothy Nishimura, is that Robert Schneider, a left-handed writer, was not the signatory of the letter. Rather, the conclusion is that the signature is that forged by Respondent. Pet. App. A-20 and A-37. Accordingly, the Respondent's reported schedules and his actual testimony are materially false.

A summary timeline of events relative to this Appeal is:

Relevant Dates	Subject Matter
1/25/01	Chapter 13 Confirmation Hearing
3/1/01	Order Allowing Examination of Father
3/23/01	First Examination Date Without Appearance
4/5/01	Order on Confirmation of Chapter 13 Plan
4/23/01	Continued Examination of Father with refusal to testify
6/12/01	Order Allowing Petitioner Relief From Stay to Continue State Court Action Against Co-Debtors
6/01 to date	Various Motions and Discovery in State Court
10/5/01	180 Day Bar Date Under § 1330
11/5/01	Robert Nishamura Conclusion of Investigation

After having requested the office of the United States Trustee refer the matter for criminal investigation or other action, (and no action taken on its part), Petitioner Joined the Trustee's Motion for Dismissal. In so doing, Petitioner requested that the Respondent's bankruptcy be dismissed or in the alternative, an evidentiary hearing be scheduled to determine whether dismissal is warranted on the above-noted grounds. Pet. App. A-20-21 and A-38.

B. Proceedings Below

The Chapter 13 Trustee responsible for monitoring Respondent's bankruptcy filed his Motion for an Order of Dismissal based upon Respondent's failure to comply with the terms of Bankruptcy Court's Order. The Petitioner joined in the Motion to Dismiss on November 6, 2002, raising the Respondent's blatant misconduct and obstruction of discovery of his misconduct as additional reasons for the Bankruptcy Court to dismiss the bankruptcy. The Bankruptcy Court heard oral argument on the Petitioner's Joinder on November 22, 2002, and denied dismissal by Order dated the same date. Petitioner filed and served a Motion for Reconsideration, which was denied.

The Petitioner timely filed a Notice of Appeal, which was reviewed by the District Court. The District Court entered its Order Affirming the Bankruptcy Court Order, without oral argument, on August 12, 2003. The District Court expressed that it shared Petitioner's indignation at the Respondent's egregious misconduct; but, the District Court nevertheless affirmed the Bankruptcy Court's denial of dismissal or conversion of the Chapter 13 to a Chapter 7 case based upon 11 U.S.C. § 1330(a). Ignoring undisputed evidence of the Respondent's obstructionist tactics, which delayed discovery of his misconduct, the District Court held that the statutory time limits upon which an aggrieved party could bring fraud to the attention of the Court could have no exceptions. The District Court subsequently denied Petitioner's Motion for Reconsideration by Order dated August 28, 2003.

The Notice of Appeal to the Ninth Circuit was timely filed. The Ninth Circuit issued its memorandum affirming the lower court. Ignoring the empirical and unrebutted evidence of massive abuse of discovery tactics, false testimony and falsified documents, and relying instead upon a bright line no-exceptions rule that the Bankruptcy Court cannot look beyond 180 days of confirmation to fashion a remedy for a debtor's fraudulent misconduct, the Ninth Circuit affirmed the lower court.

Petitioner submitted his Petition for Rehearing of the Court of Appeals memorandum en banc on June 28, 2005. The Ninth Circuit issued its Order denying Rehearing on July 27, 2005; its Judgment affirming the lower court was entered on August 8, 2005. In so doing, the Ninth Circuit has immunized Respondent from any consequences for his acts of dishonesty and has encouraged others to advance delay tactics and subterfuge so as to avoid bringing their misdeeds to light within 180 days of bankruptcy confirmation.

REASONS FOR GRANTING THE PETITION

THIS CASE RAISES THE CRITICALLY IMPORTANT QUESTION OF UNDER WHAT TERMS A COURT'S POLICE AUTHORITY CAN BE LIMITED.

This case presents an exceptionally important question of federal law that has not been addressed by this Court: Does an ad hoc statutory time limitation absolutely restrict the federal court's inherent ability to police misconduct occurring within its midst when discovery of the misconduct is thwarted by the wrongdoer? As truth and veracity in disclosures are of paramount importance to the function of bankruptcy proceedings, the answer is of paramount importance.

The Ninth Circuit concluded that a creditor in a bankruptcy proceeding has the burden of proof and is responsible to ascertain the nature and extent of a debtor's misconduct no later than 180 days from the date of bankruptcy plan confirmation. It did not address whether there would be any exception to the 180 day rule based on discovery, debtor's obstruction, or for other equitable reasons.

A. The Ninth Circuit Failed to Abide By The Long Established Principal That The Courts Have Unrestricted Ability to Police Misconduct In Judicial Proceedings.

In view of the Ninth Circuit's extreme conclusions, it is not surprising that the decision below diverges markedly from a line of cases that held that Bankruptcy Courts have inherent power to impose sanctions on parties who willfully abuse the judicial process. *In re Chisum*, 9th Cir. BAP (Cal.) 1986, 68

B.R. 471, *affirmed* 847 F.2d 597, *certiorari denied,* 109 S.Ct. 228, 488 U.S. 892, 102 L.Ed.2d 218; *In re Scientex Corp.*, (Bkrtcy.C.D.Cal.1984), 46 B.R. 41. Power to sanction the litigant who conducts himself unreasonably and vexatiously is based upon the court's inherent power to protect the orderly administration of justice and to maintain the authority and dignity of the court. *In re 2218 Bluebird Ltd. Partnership*, (Bkrtcy. S.D.Cal.1984), 41 B.R. 540.

The Ninth Circuit's conclusions ignore the circumstances prior to Congressional amendments of the Bankruptcy Code in 1984, when the authority of a Bankruptcy Court to enforce its own orders had been the subject of debate. The Bankruptcy Court's limited jurisdiction as a Non-Article III tribunal created a constitutional morass, especially when it exercised "judicial powers" to coerce compliance. In the 1982 case of *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 458 U.S. 50 (1982) this Court held that Congress may not create a court by statute which has the "essential attributes" of judicial power reserved for Article III courts. As such, the existing bankruptcy court system was deemed unconstitutional.

In response to *Marathon*, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA") and structured the bankruptcy court as a "unit" of the district court, to which the district court may refer core and non-core bankruptcy matters. 28 U.S.C. § 151 et seq.

The revised statutory scheme preserves for district courts, as Article III tribunals, the "judicial power" provided for by the U.S. Constitution.[3]

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[3] U.S. Constitution Art. III, § 1 states in part that the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish.

Since 1984, the vast majority of court decisions uphold a Bankruptcy Court's authority to rely on the Code's grant of authority to enforce the rule of law, but several have found that bankruptcy courts possess inherent police powers. *See, e.g., In re Chateaugay Corp.*, 920 F2d at 183; *In re Georgia Scale Co.*, 134 BR at 69; *In re Hamilton Allied Corp.*, 87 BR 43 (SD Ohio 1988). One of the first cases to decide that bankruptcy courts possess inherent police power was *In re Miller*, 22 B.R. 479 (1982) (civil contempt). The *Miller* court found that a creditor willfully violated a permanent injunction imposed to stop creditors from seeking pre-petition debts discharged by the court. *Id.* The creditor, therefore, was held in civil contempt. *Id.* at 679.

In *Miller,* this Court unequivocally recognized the inherent power of courts to impose sanctions upon improper behavior. *Id.* at 675-676. While the *Miller* court found that no statute was necessary to grant bankruptcy courts this judicial power, most courts find that bankruptcy courts are granted police power statutorily, whether an Article I or Article III court. *Id.*

This Court has unequivocally recognized an inherent power of courts to impose sanctions upon abusive litigation practices. *Link v. Wabash R.R.,* 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); *see also, Roadway Express v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). In neither *Link* nor *Roadway Express* did this Court interpret a limiting rule or statute as an indication of Congressional intent to limit a court's inherent power. Moreover, the Supreme Court in neither case restricted the inherent power of a court because of limiting inferences from statutory grants of authority.

Thus, all courts, whether created pursuant to Article I or Article III of the Constitution, have inherent civil power to enforce compliance with their lawful judicial orders and the rule of law, and no specific statute is required to invest a court with police powers. Accordingly, the Ninth Circuit's singular reference to 11 U.S.C. § 1330(a) and its time limitations is misplaced.

Contrary to the Ninth Circuit's approach, this Court has determined that a bankruptcy court's power is inherent in the authority to hear and determine legal disputes. It has been recognized at all times that it has the judicial power to issue orders and rules, which carry with it the power to enforce the orders and rules. *E.g., United States v. Hudson and Goodwin,* 11 U.S. (7 Cranch) 32, 3 L.Ed. 259 (1812); *In re Debs,* 158 U.S. 564 (1895). Other Circuits conflict with the Ninth in this regard. *See for e.g., Francis v. People of Virgin Islands,* 11 F.2d 860 (3rd Cir.1926); 2 *Collier on Bankruptcy,* § 105.03, at 105-7 (15th Ed.1985).

These basic principles have been reaffirmed by this Court in the case of *Young v. U.S. ex rel Vuitton et Fils S.A.,* 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987), *citing Michaelson v. United States,* and have been recognized over the past three quarter centuries of bankruptcy practice. *See Goggin v. Balsa Chica Oil Corp. (In re Sterling),* 125 F.2d 104, (9th Cir.1942).

B. Notwithstanding the Police Powers conferred upon the federal courts, the Ninth Circuit Failed T Recognize That Equity Mandates a Remedy for the Respondent's Misconduct.

In *United States v. Energy Resources Co.,* 495 U.S. 545, 549, 110 S.Ct. 2139, 2142, 109 L.Ed.2d 580 (1990), this Court explained that the broad powers conferred by the Bankruptcy Code are consistent with the "traditional understanding" that bankruptcy courts are courts of equity. There, this Court noted the inequity of throwing a judicial shroud under the guise of a limiting statute cloaking misconduct was not consistent with Congress' intent.

Despite the egregious conduct evidenced below, the Ninth Circuit did not address the doctrine of equitable tolling, where a court may make exceptions to the operation of statute of limitations. The use of this tenet in the federal courts to toll limitations periods on equitable grounds is a well-settled part of American jurisprudence. As a result, the Ninth Circuit's singular reliance on § 1330(a) as limiting a Bankruptcy Court's authority to police misconduct ignores a substantial body of law as the Bankruptcy Court is empowered to fashion a remedy for misconduct-whether as egregious as fraud or not.

The Ninth Circuit failed to address this Court's precept that equitable tolling principles are "read into every federal statute," *Holmberg v. Armbrecht,* 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946); *see also American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 559, 94 S.Ct. 756, 769, 38 L.Ed.2d 713 (1974); *Burnett v. New York Central R. Co.,* 380 U.S. 424, 427-28, 85 S.Ct. 1050, 1054-55, 13 L.Ed.2d 941 (1965); *Glus v. Brooklyn Eastern Terminal,* 359 U.S. 231, 231-34, 79 S.Ct. 760, 761-62, 3 L.Ed.2d 770 (1959), and that "recognizing judicial power to toll statutes of limitation in federal courts" does not entail "breaking new ground," *American Pipe,* 414 U.S. at 558, 94 S.Ct. at 768.

The Ninth Circuit's implicit pronouncement that the Congressional limitations period found in 11 U.S.C. § 1330(a) is without exception has no comparative support in other circuits; and, it is not consistent with this Court's prior pronouncement that the federal courts are never powerless to equitably toll the limitation period to prevent injustice. *See American Pipe,* 414 U.S. at 559, 94 S.Ct. at 769; *see also Bowen v. New York,* 476 U.S. 467, 479-81, 106 S.Ct. 2022, 2029-30, 90 L.Ed.2d 462 (1986); *Block v. North Dakota,* 461 U.S. 273, 287-88, 103 S.Ct. 1811, 1819-20, 75 L.Ed.2d 840 (1983); *Fadem v. United States,* 52 F.3d 202, 205 (9th Cir.1995).

The Supreme Court pronounced that it would invoke equitable tolling principles when consistent with congressional intent and called for by the facts of the case. Accordingly, equitable tolling is appropriately applied when it would effectuate: (1) the policies underlying the statute, and (2) the purposes underlying the limitations period. *See, e.g., American Pipe,* 414 U.S. at 554-56, 94 S.Ct. at 766-68; *Burnett,* 380 U.S. at 427-28, 85 S.Ct. at 1054-55; *Honda v. Clark,* 386 U.S. 484, 501, 87 S.Ct. 1188, 1197, 18 L.Ed.2d 244 (1967).

Thus, the lower court must determine whether equitable tolling is consonant with Congressional intent as stated in the Bankruptcy Code and the policies and purposes of the legislative scheme, and whether tolling is appropriate under a case-by-case set of facts. *See American Pipe,* 414 U.S. at 557-58, 94 S.Ct. at 767-68; *Honda,* 386 U.S. at 501, 87 S.Ct. at 1197; *Burnett,* 380 U.S. at 427, 85 S.Ct. at 1054; *see also Glus,* 359 U.S. at 234, 79 S.Ct. at 762; *Holmberg,* 327 U.S. at 395, 66 S.Ct. at 584; *see also Mt. Hood Stages, Inc. v. Greyhound Corp.,* 616 F.2d 394, 396 (9th Cir.) (*citing American Pipe* and *Burnett*), *cert. denied,* 449 U.S. 831, 101 S.Ct. 99, 66 L.Ed.2d 36 (1980). Thus, the Ninth Circuit's affirmation of the lower Court's refusal to entertain an evidentiary hearing to determine those facts after testimony under oath is err warranting certiorari to establish guidelines for the lower courts involving such fundamental issues.

C. Issuing Sanctions For Misconduct In A Judicial Proceeding Is Consistent With Congress' Intent And Serves To Deter Debtors From Engaging In Egregious Fraudulent Misconduct.

The Ninth Circuit's writing the Respondent's misconduct off as being too little to late is not consistent with Congressional intent when it enacted the Bankruptcy Code in 1984. Congress' apparent dissatisfaction with debtor bankruptcy abuse led to substantial alteration of the Bankruptcy Code in 2005.

The theories and the case law cited by Respondent and adopted by the Ninth Circuit are in direct conflict with current trend in the law.

The Congressional redraft indicates a clear public policy mandate favoring the theories advanced by the Petitioner. For example, debts from fraud will no longer be dischargeable in Chapter 13. See, 11 U.S.C. § 1328 (2005) which substantially modified the former super-discharge under Chapter 13 to not allow for future debts procured by fraud to be discharged. The modified Code specifically exempts debts procured by fraud, and debts procured by embezzlement or defalcation from discharge in Chapter 13. See, 11 U.S.C. § 1328(a)(2) (2005). Appellant converted from Chapter 7 to Chapter 13 at the last moment, on the eve of trial, to determine that the debt owed Appellant was not dischargeable under 11 U.S.C. § 523(a)(2) (fraud) and 11 U.S.C § 523(a)(4) (embezzlement and defalcation.)

Moreover, a cursory look at the law in existence at the time of the lower Court's ruling demonstrates that Congress did not intend to absolutely limit the courts inherent police powers. 11 U.S.C. § 349 establishes a general rule that dismissal of a case is without prejudice, but it also expressly grants a Bankruptcy Court the authority to "dismiss the case with prejudice thereby preventing the debtor from obtaining a discharge with regard to the debts existing at the time of the dismissed case, at least for some period of time." 3 Collier on Bankruptcy § 349.01, at 349-2-3 (15th Ed.1997). A dismissal with prejudice is a complete adjudication of the issues presented by the pleadings and a bar to further action between the parties. *In re Tomlin,* 105 F.3d 933, 936-37 (4th Cir.1997).

"Cause" under § 349 was not defined by the Code. A review of the case law indicates that "egregious" conduct must be present, but that a finding of bad faith constitutes such egregiousness. "Generally, only if a debtor engages in egregious behavior that demonstrates bad faith and prejudices creditors ... will a bankruptcy court forever bar the debtor from seeking to discharge then existing debts." *Tomlin,* 105 F.3d at 937. *See In re Huerta,* 137 B.R. 356, 374 (Bankr. C.D. Cal. 1992) (where the court finds "cause" the case may be dismissed with prejudice to filing further petitions); *In re Moses,* 171 B.R. 789, 793-94 (Bankr. E.D. Mich. 1994); *In re Walker,* 102 B.R. 612, 614 (Bankr. N.D. Ohio 1989) ("section 349 authorizes the court to punish abusive or bad faith conduct by dismissing a case with prejudice") (*citing Lerch v. Fed. Land Bank of St. Louis,* 94 B.R. 998, 1001 (N.D. Ill. 1989)); *In re Bradley,* 38 B.R. 425, 432 (Bankr. C.D. Cal. 1984) (courts should dismiss with prejudice "when the debtor's conduct is particularly egregious and only after full opportunity for a hearing"); *In re Martin-Trigona,* 35 B.R. 596, 601-02 (Bankr.S.D.N.Y.1983); *In re Jerry's Blue Room Lounge, Inc.*, 19 B.R. 963, 964 (Bankr. E.D. Pa. 1982).

Bad faith, which is generally held to be a cause for dismissal of a case under 11 U.S.C. § 1307, is also cause for dismissal with prejudice under 11 U.S.C. § 349(a). *See In re Morimoto,* 171 B.R. 85, (9th Cir. BAP) 86-87 (affirming dismissal of Chapter 13 case "with prejudice").

Historically, the proper inquiry to determine bad faith is to apply a "totality of the circumstances" test during an evidentiary hearing. A bankruptcy court must inquire as to whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his Chapter 13 plan in an inequitable manner. *In re Goeb.* 675 F.2d 1386, 1390 (9th Cir. 1982).

Here, the Ninth Circuit created an urgent need for review by this Court by affirming the Bankruptcy Court's ignoring of the specific grant of authority to undertake punitive action against the Respondent in favor of relying upon the restrictive language of § 1330, and notwithstanding Respondent's obvious bad faith and "egregious" misconduct.

CONCLUSION

For the reasons articulated above, the Petition for Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit and ultimately, to vacate the Bankruptcy Court's denial of dismissal for cause; or, to remand to the lower court for further proceedings to provide Petitioner with such other relief as is fair and just in the circumstances.

Respectfully Submitted this 30 day of November, 2005.

BY: _____

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FILED JUN 14 2005

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: MARK SCHNEIDER, Debtor, BEN F. BARCUS, Appellant, v. MARK SCHNEIDER, Appellee.	No. 03-35735 D.C. No. CV-03-05043-RBL MEMORANDUM*

Appeal from the United States District Court
For the Western District of Washington
Ronald B. Leighton, District Judge, Presiding
Submitted June 10, 2005**
Seattle, Washington

Before: THOMPSON, McKEOWN, and GOULD, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a) (2).

Ben F. Barcus appeals from the district court's decision to affirm a denial of his motion to dismiss Mark Schneider's Chapter 13 Bankruptcy plan. We affirm.

Barcus moved to dismiss Schneider's Chapter 13 plan on the ground that Schneider committed perjury by testifying that a letter, which purportedly was signed by Schneider's father and confirmed an alleged loan between the two, was genuine. A handwriting expert obtained by Barcus later determined that the signature was forged.

The timing of events is determinative of our disposition. The order confirming Schneider's amended Chapter 13 plan was entered April 11, 2001. On November 5, 2001, the handwriting expert declared in writing that the signature on the letter was forged. A full year later, on November 6, 2002, Barcus filed a motion to dismiss the Chapter 13 plan.

The central issue is whether the 180-day limit for requesting revocation of an order oaf confirmation procured by fraud, 11 U.S.C. § 1330(a), bars Barcus' motion to dismiss. Barcus argues that 11 U.S.C. § 1330(a) does not apply because he requested dismissal, not revocation. His argument is unpersuasive. The Bankruptcy Code establishes the usual relationship between revocation and dismissal. If the court revokes an order of confirmation that was procured by fraud, the court may then dismiss the case. 11 U.S.C. § 1330(a); 11 U.S.C § 1307(c)(7). Barcus seeks to bypass revocation, which is time-barred, and jump to dismissal. We decline to circumvent the Bankruptcy Code's procedures for addressing fraudulent procurement of a Chapter 13 confirmation, especially when doing so would fly in the face of an express time limitation. The 180-day limit for filing a request for revocation of a Chapter 13 plan, 11 U.S.C § 1330(a), bars Barcus' motion to dismiss, which was filed approximately a year after the 180-days had run.

The district court did not err in declining to fashion equitable relief that is inconsistent with the time limitation contained in 11 U.S.C § 1330(a). Together, the strong policy of finality applied to confirmation orders, In re Valenti, 310 B.R. 138, 145 (B.A.P. 9th Cir. 2004), and the unexplained and lengthy delay- over a year from the time the forgery became known- tip the equities against Barcus.

AFFIRMED.

Case 3:03-cv-05043-RBL Filed 08/11/2003

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

In re:	Chapter 13 No. 99-37362
	Internal Appeal No. 02-007
MARK A. SCHNEIDER,	BAP No. WW-02-1658
	USDC No. CV03-5043RBL
Debtor.	
	ORDER AFFIRMING BANKRUPTCY COURT'S ORDER

The Law Offices of Ben Barcus, Appellant, seeks review of an Order by the United States Bankruptcy Court for the Western District of Washington, refusing to revoke the confirmation of the Debtor's Chapter 13 plan. Appellant claims that the Debtor, an attorney, engaged in fraudulent, even criminal, conduct and that his Chapter 13 Plan was therefore subject to revocation, dismissal or conversion to a Chapter 7 proceeding, despite the passage of more than 180 days from the date of confirmation.

While the Court shares the Appellant's indignation at the Debtor's apparent conduct, it nevertheless agrees with the Bankruptcy Court that the remedy for such conduct must be timely invoked, and that there has been no sufficient showing to invoke principles or equitable tolling. The Order of the Bankruptcy Court is therefore affirmed.

BACKGROUND

The facts surrounding the Debtor's employment by the Appellant, its termination, and the early stages of the Debtor's Bankruptcy are lengthy and colorful, but not particularly relevant to the resolution of this appeal. As they relate to the appeal, the facts are short, agreed, and somewhat dry:

The Debtor, Mr. Schneider, converted his then-pending Chapter 7 Bankruptcy to a Chapter 13, and sought confirmation of his Plan. Appellant, a creditor and former employer, objected on October 3, 2000. There, as here, the objection related to what appear to be numerous instances of obstreperous, deceitful, and generally bad faith behavior on the part of the Debtor, both before and after his filing in the Bankruptcy Court.

An Evidentiary Hearing was held before the Bankruptcy Court on January 25, 2001. Based on testimony and evidence adduced at that hearing, on March 1, 2001, the Court permitted the Appellant to conduct the deposition of the Debtor's father, who was alleged to be a secured creditor in possession of valuable collateral.[5] The Debtor's Chapter 13 plan was Confirmed (with modifications) on April 5, 2001. By approximately November, 2001, the Appellant's expert had concluded that the document Debtor had submitted to the Court to prove his father's right to the collateral was likely a forgery.

On or about November 6, 2002, Appellant asked the Bankruptcy Court to dismiss the Debtor's Chapter 13 case or to convert it (back) to a Chapter 7 proceeding, based primarily on the fact that he had lied about the transaction with his father under oath and then produced false "evidence" at the evidentiary/confirmation hearing.[6]

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[5] The value is neither disclosed nor dispositive, but the asset in question is apparently a rare Gibson guitar purchased by the Appellant as a gift for the Debtor during happier times. After seeking bankruptcy protection, the Debtor claims to have transferred the guitar to his father as collateral for a loan, thus depriving the Appellant of the chance to reclaim it.

[6] Mr. Schneider, a lawyer, also instructed his father not to answer any questions at his court-ordered deposition. His conduct throughout, if as egregious as alleged by the Appellant, may be beyond the reach of this Court in this context, but it does raise serious questions about the Debtor's fitness for the practice of law in this jurisdiction. *See*, for example, RPC 8.4.

The Bankruptcy Court denied this Motion, finding that its ability to address the Debtor's fraudulent conduct was limited by the 180 day time frame outlined in 11 U.S.C. §1330(a). Appellant seeks de novo review of this decision. He makes three primary arguments:

1. 11 U.S.C. §1330(a) deals with revocation of confirmation, not dismissal or conversion, and the court has the separate power to invoke these remedies under 11 U.S.C. §349.
2. The Court sitting in equity has the inherent ability under 11 U.S.C. §105 to police the kind of misconduct of which Mr. Schneider is accused, and in that role can dismiss or convert his Chapter 13 case.
3. The Court should apply equitable tolling principles to suspend §1330's 180 day limitation.

The Debtor does not specifically deny that he engaged in the conduct alleged, but argues that the allegations are no irrelevant. He repeats the Bankruptcy Judge's position that there is no legal or logical support for the claim that the 180 limitation may be circumvented by dismissing (rather than revoking confirmation) after that period has expired. He argues that 11 U.S.C. §349 describes the *effect* of dismissal without conferring any *authority* to dismiss. Finally, he argues that the Appellant has demonstrated no conduct on his part which can support the application of equitable tolling. He asks the Court to affirm the Bankruptcy Court.

DISCUSSION

In reviewing a decision of the Bankruptcy Court, the District Court reviews findings of fact for clear error and conclusions of law *de novo*. In re: Tuscon Estates, Inc., 912 F.2d 1162, 1166 (9th Cir. 1990). The issues presented here are conclusions of law on largely agreed facts, and are reviewed de novo.

2. The Relevant Time Frame is the 180 period specified in 11 U.S.C. §1330 (a).

11 U.S.C. §1330(a) provides a strict 180 day time frame for revoking a confirmed Chapter 13 Plan, even where the basis for the revocation is fraud on the part of the Debtor:

> On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

Here, it is undisputed that the Debtor's Chapter 13 Plan was confirmed in April of 2001. At around the same time, handwriting samples of the debtor's father were obtained. About seven months later, the Debtor's expert opined that the signature on the purported security instrument was forged, possibly (if not probably) by the Debtor. For reasons that are not explained by either party, the hearing on the Appellant's Motion to Dismiss or Convert was not held for another year, in November 2002.

Appellant argued there, as he does here, that 11 U.S.C. §1330(a)'s 180 day limitations period did not apply because he was seeking not revocation of the confirmation, but dismissal or conversion instead. The bases offered for those alternate remedies are the Court's broad equity powers and its ability to police misconduct in matters before it. While the Court agrees that both the Bankruptcy Courts and the District Courts have broad equitable powers, no authority has been cited or found suggesting that a court can simply ignore the plain language of a limitations period where allegations of misconduct are made – even where those allegations appear to be valid and where the misconduct is egregious.

As to the argument that the remedy sought – dismissal or conversion – is not the specific remedy addressed in §1330(a), and that the limitations period should not apply, no authority is provided. The argument is a novel one, but fails for at least two reasons. First, as the Bankruptcy Court pointed out, there is no indication or implication that Congress intended to strictly limit one remedy for fraud (revocation of confirmation) for same conduct. If there were no time limitations on the latter remedies, the limitation on the former would have no meaning.

The logic of this conclusion is bolstered by the second reason that the Appellant's argument fails: There is in fact a specific code section describing when and under what circumstances a Debtor's Chapter 13 may be converted or dismissed.

11 U.S.C. §1307 "Conversion or Dismissal" explains that the revocation of Plan confirmation is itself a ground for conversion or dismissal:

> (c) [O]n request of a party in interest or the United States trustee and after notice and a hearing, the court **may convert** a case under this chapter to a case under chapter 7 of this title, **or may dismiss** a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including –
>
> ***
>
> (7) revocation of the order of confirmation under section 1330 of this title.

In other words, fraud can lead to revocation under §1330(a) if its addressed within 180 days of the plan confirmation. Revocation based on fraud can then lead to dismissal or conversion under §1307. And, under §349, the resulting dismissal may be with prejudice. As the Debtor points out, neither §349 nor §105 provides a separate, omnipotent power[4] to dismiss, convert, revoke or otherwise punish a debtor for fraud more than 180 days after the confirmation, at least absent some showing of facts sufficient to support the equitable tolling of this period.

1. There has been no showing of facts supporting equitable tolling of the 180 day limitations period.

The Appellant argues that the 180 day limitations period should be tolled on equitable grounds. Aside from correctly citing a number of cases describing the concept of equitable tolling, however, the Appellant has not demonstrated any facts supporting its application here. There is no allegation that the Debtor engaged in any conduct of deceit that precluded the Appellant from making whatever use he chose of the April 2001 handwriting samples to obtain relief from the confirmed plan. The doctrine cannot by applied in a vacuum and undoing the confirmation at this stage in the absence of facts supporting some sort of estoppel would do violence to the principle of finality embodied in 11 U.S.C. §1327(a) and served by §1330(a)'s 180 day limitations period.

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[4] Taken to its logical extreme, the Appellant's argument that courts have the inherent power "to impose sanctions upon abusive litigation practices" would obviate the need for numerous Rules governing such power, including Fed. R. Civ. P.37 (dealing with discovery abuses) and Fed. R. Civ. P. 60 (permitting relief from judgment on various grounds, including fraud). Instead, a court could fashion whatever relief it deemed appropriate given the magnitude of the abuse, regardless of the time at which the abuse occurred. While such a position is tempting in cases where the abuse is both egregious and state, the Court does not believe its equitable powers are so broad.

CONCLUSION

The Bankruptcy Court's Order of November 22, 2002, Denying the Appellant's Motion, and its December 2, 2002 Order Denying the Appellant's Motion for Reconsideration, are therefore AFFIRMED.

DATED this 11th day of August, 2003

/s/
RONALD B. LEIGHTON
United States District Judge

FILED NOVEMBER 26, 2002

Honorable Philip H. Brandt
Hearing Date: 11/26/02 @ 1:30 p.m.
Response Date:
Chapter 13
Tacoma, WA

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT COURT OF WASHINGTON

In re: **MARK A. SCHNEIDER,** Debtor.	In Chapter 13 Proceeding NO. 99-37362 **Order Denying Trustee's Motion to Dismiss**

This matter coming on before the Court upon the Chapter 13 Trustee's Motion for Dismissal, the Debtor appearing by and through his attorney, Beecher & Connitt, the Chapter 13 Trustee, David Howe, appearing, and Thomas P. Quinlan appearing on behalf of creditor, Ben Barcus, the Court having heard the argument of counsel, having reviewed the documents and pleadings on file and making oral findings on the record, now, therefore, it is hereby

ORDERED that the Chapter 13 Trustee's Motion to Dismiss and Barcus joinder are hereby dismissed.

Dated: November 26, 2002.

/s/
Honorable Philip H. Brandt
U.S. Bankruptcy Judge

Presented by:

/s/
Desa Gese Conniff, WSBA #14779
Attorney for Mark A. Schneider
Debtor

FILED JUL 27 2005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: MARK SCHNEIDER, Debtor, BEN F. BARCUS, Appellant, v. MARK SCHNEIDER, Appellee.	No. 03-35735 D.C. No. CV-03-05043-RBL Western District of Washington, Tacoma ORDER

Before: THOMPSON, McKEOWN, and GOULD, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges McKeown and Gould have voted to deny the petition for rehearing en banc, and Judge Thompson has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed.R.App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

In Re:
MARK A. SCHNEIDER,
Debtor.

Chapter 13 No. 99-37362
Internal Appeal No. 02-007
BAP No. WW-1658
USDC Case No. CV03-5043RBL

ORDER DENYING MOTION
FOR RECONSIDERATION

Appellant asks the Court to RECONSIDER its August 11, 2003 Order Affirming the Bankruptcy Court's Order. [Dkt #12] Appellant claims that the doctrine of equitable tolling (as applied to 11 U.S.C. § 1330(a)'s 180 day limitations period) was not fully addressed by this Court.

The Court considered the doctrine and the evidence offered in support of its application. According to the Appellant, the Debtor's Plan was confirmed on or about April 5, 2001. Despite his unwillingness to answer questions, the Debtor's father did provide a handwriting sample at his deposition, on or about April 23, 2001. For reasons that are not explained, the Appellant's expert's report (based in part on the April 23 sample, and opining that the underlying signature was forged) was not provided to the Bankruptcy Court for more than 180 days (or until November 5, 2001).

There is no evidentiary basis for the Appellant's assertion that the expert "could not" complete its forensic investigation "until the 180 day period has elapsed." There is no basis for concluding that any of the Debtor's various bad faith actions contributed to the passage of time between his father's deposition and the expiration of the 180 day limitations period on October 5. The Debtor's bad faith conduct did not preclude the Appellant or his expert from analyzing the handwriting sample, from forming opinions based on it, or from sharing whose opinions with the Bankruptcy Court prior to the expiration of the 180 day period.

The motion for Reconsideration is therefore DENIED.
DATED this 28th day of August, 2003.

/s/

RONALD B. LEIGHTON
United States District Court Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

In re: MARK A. SCHEIDER, Debtor.	No. 99-37362 ORDER DENYING MOTION FOR RECONSIDERATION

The motion for Reconsideration of Creditor Ben F. Barcus filed 6 December 2002 raises no issues which were not, or could not have been, considered at hearing. In re Agricultural Research and Technology Group, Inc., 916 F.2d 528, 542 (9th Cir. 1990); In re Wedgestone Financial, 142 B.R. 7 (Bankr. D. Mass. 1992); and In re Negrete, 183 B.R. 195 (9th Cir. BAP 1995).

The Motion to therefore DENIED.

DATED: 12 December 2002

/s/
Philip H. Brandt
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: MARK SCHNEIDER, Debtor, BEN F. BARCUS, Appellant, v. MARK SCHNEIDER, Appellee.	No. 03-35735 D.C. No. CV-03-05043-RBL BAP WW-02-1658 BK # 99-37362 JUDGMENT Appeal 02-007

Appeal from the United States District Court for the Western District of Washington (Tacoma).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Tacoma) and was duly submitted.

On consideration whereof, it is not here ordered and adjudged by this Court, that the judgment of the said District Court n this cause be, and hereby is **AFFIRMED**.

Filed and entered 06/14/05

Case 3:03-cv-05043-RBL Filed 08/12/2003

United States District Court

WESTERN DISTRICT OF WASHINGTON

In re: JUDGMENT IN A CIVIL CASE

MARK A. SCHNEIDER, Chapter 13 No. 99-37362
Internal Appeal No. 02-007
Debtor. BAP No. WW-02-1658
USDC No. C03-5043RBL

[√] Decision by Court. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The Bankruptcy Court's Order of November 22, 2002, Denying the Appellant's Motion, and its December 6, 2002 Order Denying the Appellant's Motion for Reconsideration, are AFFIRMED.

August 12, 2003
Date

BRUCE RIFKIN
Clerk
/s/ Jean Boring
Deputy Clerk

FILED
02 NOV -6 PM 4:24

THE HONORABLE PHILIP H. BRANDT
Chapter 13
Tacoma, WA
Hearing Date: November 12, 2002
Hearing Time: 1:30 p.m.

IN THE UNITED STATES BANKRUPTCY COURT
IN THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

In Re:	)	NO. 99-37362
	)	
MARK A. SCHNEIDER	)	**AFFIDAVIT OF BEN**
	)	**F. BARCUS IN**
Debtor.	)	**SUPPORT OF**
	)	**DISMISSAL**
STATE OF WASHINGTON	)	
	) ss:	
County of Pierce	)	

Ben F. Barcus, being duly sworn upon oath deposed and states:

10. I am a creditor herein; I state the following based upon my personal knowledge or based upon the records and files herein; I make this Affidavit in support of this Motion for Dismissal of Debtor's Chapter 13 bankruptcy or imposition of terms.

11. **Background**: Debtor's chapter 13 bankruptcy was commenced after entry of an Order of Conversion from Chapter 7; I had brought an adversary proceeding objection to discharge, under chapter 7, based upon the Debtor, my former employee, having committed several acts of theft, as well as ancillary claims. Debtor was employed by Plaintiff for a period of time from January 1992 up to February 23, 1998. My claims have essentially three (3) separate components. First, Debtor carried out an elaborate "on the side business"

during his tenure as employee with Plaintiff. Second, Defendant fraudulently induced a number of my law firm's clients to remove their files from my offices after Debtor's termination of employ, as well as converting attorney's fees due and owing to my firm during Debtor's course of employment, but collected by Debtor after his termination. Third, Debtor incurred unauthorized and fraudulent charges on my business credit card account, including among other things, the purchase of a computer.

8. I objected to confirmation of Debtor's plan; a confirmation hearing was held. One issue before the court was whether a "loan" scheduled by Debtor from his father, Robert Schneider actually existed. The loan was the claimed basis of Debtor's father claimed possessory lien of valuable goods. There was no promissory note evidencing the loan; nor was there any evidence of transfer of funds. See, *Transcript of Proceedings*, page 35, line 9 through page 36, line 3. Schneider said three times that no such document existed before the hearing (1) at the meeting of creditors; (2) at the deposition, and (3) at the Chapter 13 meeting of creditors.

9. However at the bad faith hearing, Debtor produced a document purporting to be a letter drafted by his father, confirming the existence of a loan transaction. Attached hereto is a true copy of transcript of proceedings relative to the subject document. The court will note that the Debtor's unequivocal testimony relating authenticity of the note was: "The letter submitted by you as an exhibit in this case described as the Letter from Robert Schneider, did you type that letter?"

Answer: "No."

"Who signed the letter?"

Answer: "Robert Schneider, my dad?"

Did you sign the letter for your father?"

Answer: "No."

Transcript of Proceedings, page 73 line 15-22.

2. Subsequently, the Court authorized Fed. R. Bankr. Proc. 2004 examination of Debtor's father, Robert Schneider. Attached is a copy of the Order authorizing the same. A significant amount of effort was needed to obtain Robert Schneider's presence. He failed to appear at an initial scheduled examination.

3. Ultimately, Robert Schneider appeared after threat of having the United States Marshall Service bring him in custody to the examination. At that time, hand writing exemplars of Robert Schneider were obtained. However, Robert Schneider refused to answer any questions as to whether he in fact authored the letter in questions purportedly under advice of counsel.

4. I learned that Debtor had instructed his father not to answer any such questions. I attach a copy of a letter evidencing that Debtor has once again interfered with the discovery process in that regards.

5. After obtaining the handwriting exemplars, I retained the services of a forensic specialist to analyze the signature on the letter compared to Robert Schneider's signature. The conclusion of the expert, Mr. Timothy Nishimura, is that Robert Schneider, a left-handed writer, was not the signator of the letter. Rather the conclusion is that the signature is that forged by Debtor. Accordingly, the Debtor's reported schedules, and his actual testimony is materially false.

6. On the basis of this investigation, my counsel wrote a letter to the United State's trustee's office to refer the matter for criminal investigation or other action. To date, no action has been taken by the United States Trustee's Office. Hence, my making this request at this time.

7. Based upon the Debtor's willful perjury and submitting false documents, I am requesting that the Debtor's bankruptcy be dismissed or in the alternative, an evidentiary hearing be scheduled to determine whether dismissal is warranted on these grounds.

1. Moreover, the Debtor has a documented history of recalcitrance in providing timely, complete and accurate information. For e.g., the court has found Debtor in contempt for having violated the court rules relative to discovery. The only certain way of assuring that Debtor provides accurate and complete information relative to his relative to his personal and business related income and expenses to have the Court, or a special master, supervise the disclosure process. In the event the Court does not summarily dismiss these proceedings, I am requesting an evidentiary hearing related to Debtor's income and expenses, as well as his obvious bad faith in these proceedings.

DATED this 6th day of November, 2002.

FURTHER YOUR AFFIANT SAYEHT NAUGHT.

/s/
Ben F. Barcus

SUBSCRIBED AND SWORN to before me this 6th day of November, 2002.

/s/
Notary Public
Printed Name: Rebecca A. Tanner
In and for the State of Washington
Residing at: Lacey
My Commission Expires: 11-19-05

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

In re:	)	
	)	
MARK SCHNEIDER,	)	No. 99-37362
	)	
Debtor.	)	

PARTIAL TRANSCRIPT OF THE PROCEEDINGS
BEFORE THE HONORABLE PHILIP H. BRANDT
THURSDAY, JANUARY 25, 2001
TESTIMONY OF MARK SCHNEIDER

Reported by: Robyn Oleson Fiedler
CSR # FI-ED-LR-0353KH

AHEARN & YEAGER, CERTIFIED COURT REPORTERS
(206) 405-3812

A No, she doesn't.
Q Is the prospectively looking for work in the near term?
A No, she is not.
Q Other than those bonuses that you talked about from Mr. Sawyer's office, do you receive any other income outside of what's reported by Mr. Sawyer in the 1099s and the W2s as your employment?
A No.
Q All right. As far as the loan from your father is concerned that's scheduled in both the Chapter 7 and the Chapter 13 petition documents, which are Exhibit 1C and D in our materials submitted, what type of guitar is the collateral that's described in the petition?
A It's a Gibson Olivetti 12 string.
Q Is that a guitar that Mr. Barcus purchased for you as a gift during the time of your employ with him?
A It was a gift for my birthday, yes.
Q There is no promissory note between you and your dad?
A No.
Q There is no check or document transferring and evidencing the actual transfers of money from your dad to you?
A Not that I'm aware of, no.
Q At the instance - - the document that's been submitted by you in this case descried as Letter from Robert

Schneider, I take it Robert Schneider is your father. Is that accurate?

A Yes.

Q For purposes of clarifying the record, what is your grandfather's name?

A Julius.

Q Is that Schneider as well?

A Yes.

Q Okay. At your previous 341 meetings of creditors, I had asked if there was any documents verifying the loan between you and your father, and you had indicated no. Is there any other documents other that what you have here to verify the loan?

A I don't think so.

Q Okay. When did you come into possession of this letter dated October 23, 1999 addressed To Whom if May Concern?

A It would have been when I went back for a long weekend. I think that's when I got it.

Q When is grandfather's birthday?

A Boy, I don't know. It's October.

Q When did you go back?

A October of '99. It might - - well, I don't know. I don't want to guess.

MR. QUINLAN: That's fine.
THE COURT: So we'll be at recess.
(Noon recess was taken.)

THE COURT: Okay, Mr. Quinlan?
MR. QUINLAN: Thank you, your honor.

Q (By Mr. Quinlan) You're a personal injury attorney, principally, correct?
A Yes.
Q Isn't it accurate that the standard contingency fee in related personal injury cases are typically one-third of the gross recovery of the settlement or of the verdict?
A In most cases, yes.
Q The letter submitted by you as an exhibit in this case described as the Letter from Robert Schneider, did you type that letter?
A No.
Q Who signed that letter?
A Robert Schneider, my dad.
Q Did you sign that letter for your father?
A No.
Q Okay. This morning you testified regarding your Chapter 13 plan and the expectation that the lion's share of any distribution would go to Mr. Barcus as the